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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1964.

No. 334

LOCAL UNION NO. 12405, DISTRICT 50, UNITED MINE WORKERS OF AMERICA; JOSEPH J. PIUNTI; ET AL.,

Petitioners,

vs.

MARTIN MARIETTA CORP., A MARYLAND CORP.; DISTRICT 50, UNITED MINE WORKERS OF AMERICA; ET AL.,

Respondents.

BRIEF OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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QUESTIONS PRESENTED.

Petitioners' statement of "questions presented" (pp. 2-4) thoroughly misapprehends what questions are properly before this Court.

The first of petitioners' stated "questions" is an irrelevant inquiry into the duty of a court to compel arbitration under an assumed set of facts, but omitting from that set of facts the controlling fact present in this case—that the grievance was never referred to arbitration by the petitioners' collective bargaining agent, the only party empowered by the collective agreement to refer a grievance to arbitration.

The second of petitioners' stated "questions" confuses the question of what types of disputes are arbitrable (which was not decided by the Court of Appeals) with the question of who under the contract had the right to demand arbitration. The question posed by petitioners ("Does an otherwise arbitrable grievance become non-arbitrable * * *") may well mislead this Court as to what was decided below.

The third of petitioners' stated "questions" is highly improper in that it contains the statement that the N.L.R.B. made a determination that the Local Union was a party to the collective bargaining agreement, which statement is not only unsupported by the record but is contradicted by the record (Pet. for Rehearing, p. 8).

The court below held: (1) that District 50, United Mine Workers of America (hereinafter called "District 50"), was the "Union" party to the collective bargaining agreement and the party in which the agreement lodged the right to refer a dispute to arbitration, and (2) that District 50 could not be by passed in a referral of the grievance to arbitration. The only questions properly before this Court on the instant petition for writ are whether those determinations by the District Court and the Court of Appeals are supported by the record. No other question of law is presented.

STATEMENT OF THE CASE.

Petitioners' "statement" (pp. 4-9) needs to be corrected. It ignores or confuses the facts which are clearly stated in the opinion of the Court of Appeals, and it takes unwarranted liberties with the record. Among other errors in petitioners' "statement" are the following errors:

1. Petitioners state (p. 4) that "the Company * * * transferred a substantial portion of the work thereto [sic] performed by the employees to other plants of the Company"; (p. 6) that "a substantial portion of the operations

was being transferred to the Company's other plants (App. 84, 87, 89-90)"; and (p. 7) that "the Company • • • was merely transferring most of its operations." These assertions by the petitioners are not supported by the record. The pages of the Appendix (84, 87, 89-90) cited by petitioners in support of their statements merely disclose questions by petitioners' counsel in examining a witness as to whether the Company told the witness that it was transferring its operations elsewhere and the *negative* responses by the witness to all such questions.

2. Petitioners state (p. 5) that the local union "administered the collective bargaining agreement by itself" (citing App. 81, 83), but the Appendix pages cited show merely that at the early stages of the grievance procedure the local union itself handled grievances in accordance with the contract—a contract which also requires, however, that after the initial steps have been taken by the local union, then District 50 must be brought in and that only the latter may refer a grievance to arbitration. In stressing the number of functions performed by the local union, petitioners not only ignore those performed by District 50 as such but also fail to recognize that the negotiating committee of the local union is also the negotiating committee of District 50 (the International Union), a fact which is emphasized by the signature page of the Pension Agreement (Add. App. 11) where the negotiating committee signed as representatives of District 50 and not of the local union as such. As the opinion of the Court of Appeals properly recognizes, there is no inconsistency between the fact that members of the local union signed the contract and a holding that District 50 is the "Union" party to the contract. All members of the local union were of necessity also members of District 50.

3. Petitioners misrepresent the record in stating (p. 7) that the "grievance" complained "about the Company's • • • transferring operations." As stated in the opinion

of the Court of Appeals (with complete support from the record), "[t]he grievance made no mention of any transfer of operations * * *" (Appendix to Pet. for Rehearing, p. 3a).

4. Petitioners misrepresent the record in stating (p. 8) "the National Labor Relations Board determined that the Local was a party to the collective bargaining agreement (Pet. for R'hg., p. 8)." This reference to the record "(Pet. for R'hg., p. 8)" shows that the only determination of the Board was the Regional Director's refusal to issue a complaint charging the Company with an unfair labor practice (a ruling which we understand was sustained by the General Counsel of the Board, as shown in an appendix to the answer to petition for rehearing which was filed by the Company in the Court of Appeals but omitted by petitioners from the record filed in this Court although they included their petition for rehearing in the record filed herein).

The statement of facts contained in the opinion of the Court of Appeals fairly states the case, and we will not burden this brief by repeating or elaborating on that statement in this division of our brief.

REASONS FOR DENYING WRIT.

The Court of Appeals properly affirmed the District Court's refusal to compel arbitration of petitioners' three-part grievance on the ground that District 50, the "Union" party to the collective bargaining agreement and as such the only party entitled to demand arbitration, had not referred the grievance to arbitration.

The first two grounds of the grievance were predicated on the cessation of operations by the Company (which petitioners' counsel later conceded was within the Company's prerogatives) and the third ground sought a prorata dis-

tribution of the pension fund (to which petitioners later conceded they were not entitled, in specifically excluding that issue from their appeal to the Court of Appeals). District 50 did not agree with the local union members that the existing pensioners could be deprived of their vested rights in the pension fund, and it was engaged in collective bargaining with the Company on alleviating the economic impact of the plant shut-down on the local union members when the petitioners demanded, and filed, suit to compel, arbitration of their three-part grievance. Petitioners' demand for arbitration was not served on District 50, nor was District 50 named in their suit, in which District 50 was, therefore, compelled to intervene.

I.

Petitioners have asserted, first, that the decision of the courts below conflicts with the holding of this Court in *Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, that under the facts there presented the arbitrator, not the court, was the appropriate body to decide whether precedural prerequisites conditioning, under the agreement, the duty to arbitrate, had been met. The *Wiley* case, however, involved an effort by the "Union" party to the contract (the sole bargaining agent) to compel arbitration, whereas the case at bar involves an effort by other parties to by-pass the "Union" party to the contract (the sole bargaining agent) in seeking to compel arbitration, contrary to the express provision of the collective bargaining agreement as to who may refer a dispute to arbitration. The two cases are clearly distinguishable.

Petitioners apparently feel that the *Wiley* decision required the District Court in the case at bar to submit to an arbitrator (in whose selection District 50 presumably would be conceded no part), for final and binding decision,

not a mere procedural question whether there was compliance with the initial steps of the grievance procedure prerequisite to arbitration, but the substantive question (decided by the courts below in favor of District 50) whether the local union or District 50 is the collective bargaining agent entitled to seek arbitration under the contract. No such result can be said to be required herein by the decision of this Court in the *Wiley* case, which reiterates the rule that "the courts have the task of determining 'substantive arbitrability'" (376 U. S., at p. 558).

Few court cases involve rival employee factions each claiming exclusive power to administer the grievance procedure under a particular contract. There is, however, one reported case which not only involved those facts but also decided the question whether it was for the court or for the arbitrator to decide which of the two employee factions had the legitimate claim. In *Application of American Machine & Foundry Co.*, 193 Misc. 990, 85 N. Y. S. 2d 456 (1948), there had been two rival employee grievance committees, each claiming to be the properly constituted grievance committee in which the collective bargaining agreement vested the power to refer a grievance to arbitration. One committee attempted to refer a grievance to the arbitrator named in the labor contract, whereupon the other committee joined the employer in seeking a court order staying the arbitration. Justice Charles W. Froessel (later of the N. Y. Court of Appeals) held that the jurisdiction of the arbitrator depended upon whether the committee which referred the matter to him had the proper authority to act under the labor agreement and that the question whether the proper committee had called for arbitration was for the court to decide, not the arbitrator. Whether there could be any arbitration at all depended upon a determination whether the proper party had requested it, a fundamental question, to be decided by the court.

In this New York case, the labor contract designated the arbitrator by name, so there was someone in existence, duly designated, to whom the court could have left the determination whether the proper grievance committee had demanded arbitration. In the case at bar, no arbitrators are named in the collective bargaining agreement, so the identity of the arbitrators cannot be determined unless and until the "Union" (District 50) demands arbitration. The holding of Justice Froessel that this was a question for the court, notwithstanding the fact that the arbitrator was named in the contract, and notwithstanding New York State's well-known history of leaving questions of procedural arbitrability to the arbitrator, gives the *American Machine & Foundry Co.* case added emphasis.

Petitioners cite no case holding that arbitration may be compelled at the behest of any party or parties other than those on whom the collective bargaining agreement bestows the right to refer a dispute to arbitration, and there are numerous cases to the opposite effect. The latter cases are in no wise inconsistent with the *Wiley* case, and there is nothing in the opinion in the *Wiley* case to suggest any disapproval of those cases by this Court.

Cases which have held that employees may not demand arbitration where the "Union" is given that right and no provision is made in the collective bargaining agreement for an employee to request or demand arbitration include: *Black-Clawson Co., Inc.* v. *International Ass'n of Mach.*, 313 F. 2d 179 (C. A. 2, 1962); *Ostrofsky* v. *United Steelworkers of America*, 171 F. Supp. 782 (D. Md. 1959), affirmed 273 F. 2d 614 (C. A. 4, 1960), cert. denied 363 U. S. 849; *Remak* v. *Electric Auto Lite Co.*, 49 LRRM 2570, 44 LC ¶17,340 (Pa. Com. Pleas, 1961); *Arsenault* v. *General Electric Co.*, 147 Conn. 130, 157 A. 2d 918 (1960), cert. denied 364 U. S. 815; *Calka* v. *Tobin Packing Co.*, 176 N. Y. S. 2d 910 (1958), affirmed 192 N. Y. S. 2d 886 (App. Div.

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Some of the policy reasons which preclude individual employees (singly or in concert) from circumventing the "Union" in the grievance arbitration procedure are stated in *Ostrofsky* v. *United Steelworkers of America*, 171 F. Supp. 782, 790-791 (D. Md. 1959), affirmed 273 F. 2d 614 (C. A. 4, 1960), cert. denied 363 U. S. 849, as follows:

> "A union's right to screen grievances and to press only those it concludes should be pressed is a valuable right, and on balance it benefits all employees. Professor Cox has pointed out that there are 'strong reasons for concluding that the bargaining representative ought to have power under a broad industrial agreement to control, whether by pressing grievances, invoking arbitration, or instituting legal proceedings.' 69 Harv. L. Rev. at 625. The pertinent reasons may be summarized as follows:
>
> "A prime function of a grievance procedure is to secure uniformity in interpreting the agreement and building up a 'law of the plant' with respect to matters not spelled out in the agreement. In grievances arising out of problems not foreseen at the time of contract negotiations, although the issue is nominally framed by the past, the important question is often what rule shall govern the parties' conduct in the future. The group may be affected by future implications of the ruling to an extent that far outweighs the individual's claim for damages. Vesting the Union with control of all grievances increases the likelihood of uniformity

and reduces 'a potential source of competitions and discriminations that could be destructive of the entire structure of labor relations in the plant.' It prevents dissident minorities from pressing real or imagined grievances in an effort to squeeze the last drop of competitive advantage out of each grievance. Allowing an individual to compel arbitration whenever he is dissatisfied with a company-union adjustment would discourage day-to-day cooperation between union and company in which grievances are treated as problems to be solved. Public officials and arbitrators, as well as employers, constantly remind union officials that they have a duty to discountenance disruptive and frivolous claims. If they are to accept this responsibility, union officials should be given the power to make their decisions effective.

"Professor Cox concludes that the untrammeled individual enforcement of collective bargaining agreements would hamper the growth of sound labor-management relations. The courts have supported this conclusion. 'The philosophy of the Union in retaining control over disputes and of the Company in requiring the same is sound. A contrary procedure which would allow each individual employee to overrule and supersede the governing body of the Union would create a condition of disorder and instability which would be disastrous to labor as well as to industry.' [Citations.]"

In *Black-Clawson Co., Inc.* v. *International Ass'n of Mach.*, 313 F. 2d 179 (C. A. 2, 1962), the court states (p. 186):

"Chaos would result if every disenchanted employee, every disturbed employee, and every employee who harbored a dislike for his employer, could harass both the union and the employer by processing grievances through the various steps of the grievance procedure and ultimately by bringing an action to compel arbitration in the face of clear contractual provisions intended to channel the enforcement remedy through the union."

II.

The second argument advanced by petitioners is a supposed "conflict * * * between two forums having concurrent jurisdiction", a conflict which, as stated hereinabove, does not appear from the record. Respondent District 50 is not familiar with the proceedings before the National Labor Relations Board to which the petitioners allude, because District 50 was not a party to any such proceedings (and would not have been bound by any determination by the Board purporting to affect its interests, had such a determination been made). However, it appears from Exhibit A in the Appendix to the Petition for Rehearing which petitioners filed in the Court of Appeals that the only "determination" made by the Board was its Regional Director's refusal to issue a complaint against the Company charging a violation of Section 8 of the National Labor Relations Act. (Pet. for Rehearing, p. 8). The presumed violation was that the Company "refused to bargain with Local 12405 by denying it the right to have counsel of its own choosing present during negotiations between the Union and the Employer" (App. 257). Even if the NLRB had not refused to issue a complaint against the Company but had, instead, found that the Company's refusal to permit counsel of the local union's choosing to attend collective bargaining sessions was an unfair labor practice, such finding would not have been in conflict with the decision of the District Court and Court of Appeals that District 50 could not be by-passed in petitioners' attempt to demand arbitration. Not even the petitioners go so far as to claim that the NLRB held that District 50 was not a necessary party to any demand for arbitration.

III.

This Court will grant review on a writ of certiorari "only when there are special and important reasons therefor" [Rule 19 (1) of the Rules of this Court]. Petitioners have failed to show any such reasons for granting the writ. The decision of the Court of Appeals is not in conflict with any other Federal court decision to which the Court has been referred, nor does the decision involve a Federal question "which has not been, but should be, settled by this court". The Court of Appeals merely decided a simple question of substantive contract law regarding the identity of the "Union" party to the collective bargaining contract without whose request and participation a grievance could not be referred to arbitration.

CONCLUSION.

We submit that the reasons advanced in the petition for granting the writ are without substance. The writ of certiorari should, therefore, be refused.

Respectfully submitted,

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